Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO.___

DEAN C. DAUW, Petitioner,

v.

UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NICHOLAS F. MANISCALCO
Attorney for Petitioner
180 North LaSalle St.
Suite 3110
Chicago, Illinois 60601
312-263-3344

PUBLISHER'S NOTE

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QUESTION PRESENTED

Whether, under 18 U.S.C. section 3663, as amended in 1984, a restitution order is limited to the amounts referred to in the specific counts to which a defendant is found guilty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS

STATEMENT OF THE CASE

ARGUMENT

CONCLUSION

Appendix -

TABLE OF AUTHORITIES

CASES:

Hughey vs. Unites States,...13,15,21,23,32
495 U.S. 411, (1990).

United States v. Angelina,.....29
951 F.2d 1007, 1009 (Cir 199).

United States v. Arnold,.....29,31
947 F.2d 1236 (5th Circuit 1991)

United States v. Badaracco,.....18,24,25
954 F.2d (3rd Circuit 1992)

United States v. Brothers,.....16
955 F.2d 493, (7th Circuit 1992)
cert denied, ___ U.S. ___113 S.Ct 142

United States v. Cook, ...18,26,27
954 F.2d 1262 (10th Circuit 1991)

United States v. Cronin,.....17,28
990 F.2d 663 (1st Circuit 1993)

United States v. Jewett,.....18,29
978 F.2d 248 (6th Circuit 1992)

United States v. Langer,.....16
962 F.2d 592 (7th Circuit 1992)

United States v. Marsh, ... 18,25,26,29
932 F.2d 710 (8th Circuit 1991)

United States v. Pivorotto 28
986 F.2d 669, 673 N.5 (3rd Circuit 1993)

United States v. Pomazi, ...19
851 F.2d 244 (9th Circuit 1988)

United States v. Seligsohn 17,22,24,28
981 F.2d 1418 (3rd Circuit 1992)

United States v. Sharp 18,19,20,29
941 F.2d 811 (9th Circuit 1991)

United States v. Snider, ...22
945 F.2d 1108, 1110-1112
(9th Circuit, 1991)

United States v. Stone, ...18,20,21,29
948 F.2d 700 (11th Circuit 1991)

United States v. Stouffer, ...31
986, F.2d 916, 928 (1993)

United States v. Streebing, ...29
987 F.2d 368 (6th Circuit 1993)

United States v. Turino.....14,16,17
978 F.2d 315 (7th Circuit 1992)
cert denied, _____U.S._____, 113
S. Ct. 2969 (1993)

United States v. Wainwright.....27
938 F.2d 1096 (1991)

United States v. Woods 23
775 F.2d 82 (3d Circuit 1985)

United States v. Young,.....22
953 F.2d 1288 (11th Circuit 1992)

STATUTES:

18 U.S.C. Sec. 1341 Frauds and Swindles.
18 U.S.C. Sec. 3663 Order of Restitution.
(As Amended, 1990).
18 U.S.C. Sec. 3663 Order of Restitution
(As Amended 1984, formerly numbered 18
U.S.C. Sec. 3579.

United States v. Turino.....14,16,17
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OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. The order of the District Court also appears on the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1995. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sec. 1341. Fraud and Swindles

18 U.S.C. Sec. 3663. Order of Restitution
(As Amended, 1990)

18 U.S.C. Sec. 3663. Order of Restitution
(As Amended 1984, formerly numbered
18 U.S.C. Sec. 3579)

STATEMENT OF THE CASE

In Case Number 89 CR 728, Dr. Dean C. Dauw, the Appellant herein, was charged with two counts of mail fraud. Count One alleged a scheme to defraud various insurance companies by billing the companies for psychological treatments not given. The count also alleged that Dr. Dauw obtained in excess of $100,000.00 by the scheme. Count I further alleged a specific mailing on May 10, 1985, of a check from the Continental Assurance Company in the amount $2,800.00. Count Two incorporated Count I's description of

the scheme by reference and further alleged a specific mailing on August 28, 1985 of a check from the Chicago Welfare Trust in the amount of $1,605.00.

Pursuant to a plea agreement, Dr. Dauw pled guilty to the two-count information on August 30, 1989. In the plea agreement, Dr. Dauw acknowledged that he obtained in excess of $100,000.00 as a result of the scheme. Dr. Dauw further agreed that the Court shall order restitution in an amount to be determined at the time of sentencing.

On November 6, 1989, Judge Moran sentenced the Defendant on Count One to

incarceration for 24 months. The incarceration was to run concurrently with his sentence in Case No. 88 CR 792. (Not a subject of this appeal). In Count two, the Defendant was placed on five years probation, consecutive to all custody sentences. Dr. Dauw was also ordered to make restitution in the sum of $379,400.00 to the extent feasible as determined by the probation department.

Three years later the Defendant filed an action seeking post-conviction relief, based on the decision of the United States Supreme Court in Hughey v. United States, 495 U.S. 411 (1990). The District Court

held that the relief requested was barred by earlier decisions of the Circuit. United States v. Turino, 978 F.2d 315 (7th Cir. 1992), cert.denied, ___U.S.___, 113 S.Ct. 2969 (1993). The United States Court of Appeals for the Seventh Circuit affirmed, declining to revisit its earlier holdings.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 18 U.S.C. sec.3663 (AS AMENDED IN 1984).

Section 3663 of Title 18 of the United States Code (formerly 18 U.S.C. section 3759) allows a sentencing court to order a defendant to "make restitution to

any victim of the offense." In Hughey v. United States, 495 U.S. 411 (1990), the Supreme Court held that this language authorized an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction. Hughey, 495 U.S. at 420.[1]

In a series of cases, the Seventh Circuit has held that when the offense of conviction is mail fraud, the court may order restitution based on the entire

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[1] Following the decision in Hughey, Congress amended the VWPA to the victims of the entire scheme for the entire amount of their losses. See 18 U.S.C. Sec. 3663, as amended by the Crime Control Act of 1990, Pub. No. 101-647, Sec. 2509, 104 Stat 4789, 4869 (1990).

scheme. United States v. Turino, 978 F.2d 315, 318 (7th Cir. 1992), cert. denied, _____U.S._____, 113 S.Ct. 2969 (1993) (rejecting the Appellant's argument that this approach was barred by the United States Supreme Court's decision in Hughey). See also, United States v. Brothers, 955 F. 2d 493, 496-97 (7th Cir. 1992) cert. denied, _____U.S._____, 113 S.Ct. 142, (district court may order restitution in the entire amount of the scheme, not just the three checks defendant was convicted of improperly receiving at trial), and United States v. Langer, 962 F.2d 592 (7th Cir. 1992).

In explaining its holdings, the Seventh Circuit stated that "because the scheme is an element of the offense of mail fraud, a conviction for mail fraud can support a conviction for a broad scheme even though the defendant is not specifically convicted for each fraudulent act encompassed within this scheme." Turino, 978 F.2d at 319. This interpretation of the statute at issue is in conflict with the Courts of Appeals for the First Circuit, e.g., United States v. Cronin, 990 F.2d 663 (1st Cir. 1993), the Third Circuit, e.g., United States v. Seligsohn, 981 F.2d 1418 (3rd Cir. 1992),

United States v. Badaracco, 954 F.2d 928 (3rd Cir. 1992), the Sixth Circuit, e.g., United States v. Jewett, 978 F.2d 248 (6th Cir. 1992), the Eighth Circuit, e.g., United States v. Marsh, 932 F.2d 710 (8th Cir. 1991), the Ninth Circuit, e.g., United States v. Sharp, 941 F.2d 811 (9th Cir. 1991), the Tenth Circuit, e.g., United States v. Cook, 952 F.2d 1262 (10th Cir. 1991), and the Eleventh Circuit, e.g., United States v. Stone, 948 F.2d 700 (11th Cir. 1991). Each circuit's position will be addressed seriatim.

The position of the Seventh Circuit is in direct conflict with the Ninth

the existence of a scheme is "too fine a point on which to distinguish Hughey, particularly since the indictment in Hughey also alleged a scheme." Sharp, 941 F.2d at 815.

The Seventh Circuit position is also in conflict with the Eleventh Circuit. In United States v. Stone, 948 F.2d 700 (11th Cir. 1991), the Eleventh Circuit held that the decision in Hughey prohibited an award of restitution exceeding the loss attributable to the specific offense to which the defendant pled guilty. In Stone, the defendant was charged with, among other things, eleven counts of mail

fraud. The defendant pled guilty to one count, which alleged that she had submitted a fraudulent credit card application. Stone, 948 F.2d at 701. The defendant was then ordered to pay restitution in the amount of $12,390.85, based on the entire scheme.

On appeal, the United States Court of Appeals for the Eleventh Circuit held that pursuant to the decision in Hughey, a restitution order under the VWPA may not exceed the loss attributable to the specific conduct that is the basis of the offense of conviction. Stone, 948 F.2d at 704. Thus, the court vacated the award of

restitution and remanded for re-sentencing.

In United States v. Young, 953 F.2d 1288 (11th Cir. 1992), the Eleventh Circuit held that the sentencing court had no authority to impose restitution in an amount greater than the amount caused by the offense of conviction. Young, 953 F.2d at 1290. Accord, United States v. Snider, 945 F.2d 1108, 1110-1112 (9th Cir. 1991).

The Third Circuit specifically declined to follow the reasoning underlying the Seventh Circuit line of cases in United States v. Seligsohn, 981

any victim of the offense." In Hughey v. United States, 495 U.S. 411 (1990), the Supreme Court held that this language authorized an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction. Hughey, 495 U.S. at 420.[1]

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Circuit's position as outlined in United States v. Sharp, 941 F.2d 811 (9th Cir. 1991). Prior to the decision of the United States Supreme Court in Hughey, the Ninth Circuit held that a finding of guilt of a single count of wire fraud could support an order of restitution based on the entire scheme. United States v. Pomazi, 851 F.2d 244 (9th Cir. 1988). However, in Sharp, the Sixth Circuit interpreted Hughey as overruling Pomazi and limiting restitution in wire fraud to the amount specified in the count to which the guilty plea was made. Sharp, 941 F.2d at 813. The Ninth Circuit held that

the existence of a scheme is "too fine a point on which to distinguish Hughey, particularly since the indictment in Hughey also alleged a scheme." Sharp, 941 F.2d at 815.

The Seventh Circuit position is also in conflict with the Eleventh Circuit. In United States v. Stone, 948 F.2d 700 (11th Cir. 1991), the Eleventh Circuit held that the decision in Hughey prohibited an award of restitution exceeding the loss attributable to the specific offense to which the defendant pled guilty. In Stone, the defendant was charged with, among other things, eleven counts of mail

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The Third Circuit specifically declined to follow the reasoning underlying the Seventh Circuit line of cases in United States v. Seligsohn, 981

F.2d 1418 (3rd Cir. 1992). Prior to Hughey, the Third Circuit adhered to the position that when the offense of conviction was a scheme to defraud, an order of restitution could encompass the entire fraudulent operation regardless of the actual offense of conviction. E.g., United States v. Woods, 775 F.2d 82 (3d Cir. 1985).

After the decision of the Supreme Court in Hughey, the Third Circuit reversed its earlier position. When invited by the government to distinguish Hughey because Hughey did not involve a scheme to defraud, the court refused,

stating, "[w]e decline to adopt such a narrow reading of Hughey and, instead, decide that we should take the Supreme Court at its word that the count of conviction controls the amount of restitution. Seligsohn, 981 F.2d at 1421. (Citations omitted).

Similarly, in United States v. Badaracco, 954 F.2d 928 (3rd Cir. 1992), the defendant was charged with a multi-count indictment. In reviewing the award of restitution the court stated, "where, as here, a defendant is charged in a multi-count indictment, any award of restitution must be based on losses to the

victim that were caused by the counts to which the defendant was convicted or to which he pled guilty" (footnote omitted). Badaracco, 954 F.2d at 942.

The Seventh Circuit also is at odds with the Eighth Circuit. In United States v. Marsh, 932 F.2d 710 (8th Cir. 1991) the defendant pled guilty to three counts of mail fraud. The three counts together alleged damages of $106,875.00, but the defendant was ordered to pay restitution of 3 million dollars, the amount of the entire scheme. The government again argued that Hughey did not preclude this

order because the indictment alleged a scheme. Marsh, 932 F.2d at 712.

The Eighth Circuit rejected this argument, stating, "[i]n terms of ordering restitution, it is irrelevant whether the crime charged is one requiring an underlying scheme or one that does not require such a showing. In either case, restitution is limited to the specific conduct underlying the convictions." Marsh, 932 F.2d at 712-713. The order of restitution was eventually affirmed on other grounds. Marsh, 932 F.2d at 713.

In United States v. Cook, 952 F.2d 1262 (10th Cir. 1991), the United States

Court of Appeals for the Tenth Circuit similarly rejected the position of the Seventh Circuit. In Cook, the defendant was charged in a 43 count indictment alleging the embezzlement of 43 checks totaling $23,208.00. She pled guilty to three counts of the indictment, and was ordered to pay restitution in amount of $23,208. The court held the Hughey decision allowed restitution only for the counts to which the defendant pled guilty. This amount totaled $1,585.00, the total of the three checks the defendant admitted embezzling. Cook, 952 F.2d at 1265. See also, United States v. Wainwright, 938

F.2d 1096 (1991) (offense of conviction was bank fraud).

In United States v. Cronin, 990 F.2d 663 (1st Cir. 1993), the First Circuit adopted the majority view limiting the amount of restitution to the counts on which the defendant is found guilty. Cronin, 990 F.2d at 666. That court's review of the circuits indicated that the Fifth Circuit and the Seventh Circuit stand alone in the contention that schemes to defraud constitute an exception to the Hughey opinion, citing United States v. Pivorotto, 986 F.2d 669, 673 n.5 (3rd Cir. 1993), United States v. Seligsohn, 981

F.2d 928 (3rd Cir. 1992), United States v. Jewett, 978 F.2d 248 (6th Cir. 1992), United States v. Streebing, 987 F.2d 368 (6th Cir. 1993), United States v. Sharp, 941 F.2d 811 (9th Cir. 1991), United States v. Angelina, 951 F.2d 1007, 1009 (9th Cir. 1991), United States v. Wainwright, 938 F.2d 1096 (10th Cir. 1991), United States v. Stone, 948 F.2d 700 (11th Cir. 1991), and United States v. Marsh, 932 F.2d 710 (8th Cir. 1991).

In dicta the Fifth Circuit has expressed disagreement with the Seventh Circuit's position. In United States v. Arnold, 947 F.2d 1236 (5th Cir. 1991)

(per curiam), the defendant was charged in a 15 count indictment alleging a scheme to defraud a total of $669,390.00. The defendant pled guilty to one count of the indictment, which alleged he had $23,000 fraudulently wire transferred to him. When he was ordered to pay restitution in the amount of $669,390, the defendant appealed.

Although the court of appeals eventually affirmed on the grounds that the order of restitution was properly imposed under the post-Hughey amendments to the VWPA, it stated that Hughey and other Fifth Circuit precedent would limit

the order of restitution to $23,000.00, the amount alleged in the count to which the defendant pled guilty. Arnold, 947 F.2d at 1237. But see United States v. Stouffer, 986, F.2d 916, 928 (5th Circuit 1993).

The conflict between the Circuit Courts of Appeal raises significant problems regarding the application of the Hughey decision when the defendant is charged with a scheme to defraud under the VWPA as amended in 1984. These questions can not be answered until the United States Supreme Court offers a definitive

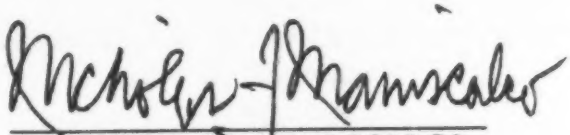
decision as to which is the proper interpretation of Hughey.

The outstanding issue is whether the Hughey decision is to be taken at face value as limiting restitution to the amount alleged in the offense of conviction. The Seventh Circuit has ignored the dictates of Hughey when the offense of conviction involves a scheme to defraud. The split between the circuits on this issue is complete and total. The Supreme Court must rule on this issue or the amount of restitution ordered can be completely dependent on the circuit in

which the defendant is charged with a crime.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.



NICHOLAS F. MANISCALCO
Attorney For Petitioner
180 N. LaSalle St. #3110
Chicago, Illinois 60601
(312) 263-3344

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois
Submitted December 1994 *[AGC1]
Decided January 18,1995

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, CIRCUIT JUDGE

DEAN C. DAUW, Petitioner-Appellant	]Appeal from the]United States]District Court
No. 93-3812	]Northern]District of
UNITED STATES OF AMERICA,	]Illinois,]Eastern
Respondent-Appellee	] Division] No. 93 C 4318 James B. Moran Judge Presiding

In August of 1989, Dean Dauw, a psychologist and professor at DePaul University, pled guilty to two counts of Defrauding and obtaining money by false and fraudulent pretenses in violation of 18 U.S.C. Sec. 1341. Specifically, Dauw admitted to fraudulently obtaining in

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* After prliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument" See Fed. R. App. P. 34 (a); Circuit Rule 34 (f). No such statement having been filed, the appeal is submitted on the briefs and the record.

of probation on count two. Restitution was imposed in the amount of $379,400.00.

Dauw did not file a direct appeal. Thereafter, Dauw filed a motion to reduce the incarceration portion of his sentence. The motion was denied and Dauw did not appeal. Three years later, however, Dauw filed the instant action seeking post-conviction relief. 28 U.S.C. Sec. 2255.

Dauw asserts that the district court erred by ordering restitution to victims beyond those specified in the plea agreement. Dauw argues that under Hughey v. United States, 495 U.S. 411 (1990),

excess of $100,000.00 by submission of false insurance claims for psychological services not in fact rendered. The plea agreement provided that the total potential sentence for the two counts was ten years imprisonment, a $500,000.00 fine as well as any restitution ordered by the court. With regard to the restitution, the agreement specified that the court would order restitution pursuant to 18 U.S.C. Sections 3663 and 3664 in an amount to be determined at sentencing. The court sentenced Dauw to twenty-four months' incarceration on count one and a concurrent five-year term

decided subsequent to the appeal-period on his sentence, the amount of restitution imposed cannot exceed the amount of loss alleged in the counts of conviction. Dauw requests that restitution be reduced from $379,400.00 to $4,405.00, the amount of loss caused by the specific mailings described in the two counts to which he pled guilty. The District Court denied Dauw's petition, finding it foreclosed by United States v. Turino, 978 F.2d 315 (7th Cir.1992), *cert. denied*, 113 S.Ct. 2969 (1993)

We affirm.

Dauw's failure to raise this issue at trial or on direct appeal would generally bar him from raising it in a federal habeas proceeding absent a showing of cause for his procedural default and actual prejudice. United States v. Frady, 456 U.S. 152, 166-68 (1982). Dauw contends that he has cause for his procedural default because his claim, resulting from the change in law established in Hughey, was novel and unavailable to him either at the time of his trial or at the time of his direct appeal. *See* Salberg v. United States, 969 F.2d 379, 382 (7th Cir. 1992). In

Reed v. Ross, 468 U.S.1, 16, (1984), the Supreme Court held that "where a constitutional claim is so novel that its legal basis in [sic] not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *See* Salberg, 969 F.2d at 382 (interpreting a constitutional claim as "reasonably available" if the decision establishing that claim "(1) expressly overruled existing Supreme Court precedent, (2) overturned a long-standing and widespread practice to which a "near unanimous" body of lower court authority had adhered or (3) disapproves a practice

that the Supreme Court had arguably sanctioned in the past," citing Reed, 468 U.S. at 17). However, in light of Teague v. Lane, 489 U.S. 288 (1989), the validity of Reed is questionable. *See* Prihoda v. McCaughtry, 910 F.2d 1379, 1386 (7th Cir. 1990). *But see,* Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.) (en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under Teague."), *cert. denied,* 114 S. Ct. 269 (1993).

We need not consider whether Hughey constitutes a "new rule" entitling Dauw

to habeas relief, *see* Williams v. Chrans, 945 F.2d 926, 942 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992), however, because we find Dauw's claim barred by Turino. In Hughey, the Supreme Court held that the Victim and Witness Protection Act of 1982 ("VWPA"), formerly 18 U.S.C. Sec. 3651, but renumbered as Sec. 3663, limits restitution to the "loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S. at 413. In Turino, this court held that in the context of mail fraud (18 U.S.C. § 1341), Hughey does not preclude an order of

restitution for the entire mail fraud scheme. Our reasoning was that "[p]roof of a scheme is an element of the offense of mail fraud, and therefore, actions pursuant to that scheme should be considered conduct that is the basis of the offense of conviction." 978 F.2d at 318 (quoting United States v. Bennett, 943 F.2d 738, 740 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2970 (1992)). Our holding in Turino clearly encompasses the facts of Dauw's case, and we decline to revisit our holding on this issue at this time.

Dauw contends that adherence to Turino denies him due process because other individuals convicted of the same acts would not be subject to the same restitution. See, e.g., United States v. Jewett, 978 F.2d 248 (6th Cir. 1992); United States v. Badaracco, 954 F.2d 928 (3rd. Cir. 1992); United States v. Marsh, 932 F.2d 710 (8th Cir. 1991). This argument is raised for the first time in the reply brief, and accordingly, we will not consider it. Morrison v. Duckworth, 929 F. 2d 1180, 1183 n.3 (7th Cir. 1991) Circuit Rule 28 (f).

AFFIRMED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge

or Magistrate Judge JAMES B. MORAN

Case Number 93 C 4318 (89 CR728-1)

Date September 23, 1993

Case Title U.S.A. vs. DEAN CHARLES DAUW

Petitioner seeks, by this Section 2255 petition, to vacate, set aside or correct a restitutional order. As his counsel commendably advises, the relief he seeks is foreclosed by United States v. Turino, 978F.2d 315 (7th Cir.1992) and similar cases in this Circuit. He wishes, however, to revisit the issue on appeal.

The petition is denied and the cause is dismissed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

V.

DEAN CHARLES DAUW

CASE NUMBER: 93 C 4318 (89 CR 728-1)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition is denied and the cause is dismissed.

Date: September 23, 1993

September 23, 1993
Date

H. Stuart Cunningham

Clerk

Willie A. Haynes
Deputy Clerk

18 U.S.C Sec. 1341. Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme, or artifice or attempting so to do, places in any post office or

authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or retakes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined, not more than $1,000.00 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person, shall not be fined more than $1,000,000 or imprisoned

not more than 30 years, or both. (As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, Sec. 961(I), 103 Stat.500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, Sec. 250 (h) 104 Stat. 4861.)

18 U.S.C. Sec. 3663. Order of Restitution. (As Amended, 1990)

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) For the purposes of restitution, a victim of an offense that involves as an

element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement...

(As amended Pub. L. 99-646, §§ 8 (b), 20(a),, 77(a),, 878(a), 79(a), Nov. 10, 1986, 100 Stat. 3593, 3596, 3618, 3619; Pub.L. 100-182, § 13, Dec. 7, 1987, 101 Stat. 1268; Pub.L. 100-185, § 12, Dec. 11, 1987, 101 Stat. 1285; Pub.L. 100-690,

Title VII, § 7042, Nov. 18, 1988, 102 Stat. 4399; Pub.L. 101-647, Title XXXV, § Nov. 29, 1990, 104 Stat. 44863, 4931.)

18 U.S.C. Sec. 3663 Order of restitution

(As Amended 1984, formerly numbered 18 U.S.C. § 3579)

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the

court shall state on the record the reasons therefor.

(b) The order may require that such defendant-

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense-

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of-

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii)the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;...

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for

which the victim has received or is to receive compensation, except that the court in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in-

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of April, 1995 one copy of the Petition for Writ of Certiorari was mailed postage pre-paid to the following:

Solicitor General
Department of Justice
Washington, D.C. 20503

Madeline Murphy
Assistant U.S. Attorney
c/o United States Attorney's Office
219 S. Dearborn Street
Chicago, Illinois 60604

Nicholas J. Maniscalco

NICHOLAS J. MANISCALCO